BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

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Particulars in Aviation Product Liability Cases

On June 26, 2008, one of Quantum Helicopters Ltd's ('Quantum") Bell helicopters suffered a hard landing in British Columbia following an engine failure — causing damage to the rotorcraft.

Quantum commenced legal proceedings alleging that the engine failure was caused by a defective power turbine blade due to a fatigue crack which caused an overstress fracture of the remainder of the blade. Quantum also alleges that the fatigue crack originated at a metallurgical anomaly in the power turbine blade which had been introduced when it was cast.

Quantum named a number of parties as defendants in the action, including Honeywell International Inc. (the engine manufacturer), Howmet Castings & Services, Inc. and Howmet Corporation (the companies alleged to have cast the subject blade) as well as Airborne Aero Engines Ltd. (an aircraft engine maintenance facility which performed work on the helicopter prior to the accident).

There were several bundles of allegations made as to Airborne's negligence in the claim, two of which were that Airborne:

(i) failed to comply with Honeywell's overhaul manuals, instructions, bulletins and recommended practices for the overhaul of the engine; and

(ii) failed to properly service, repair, test, inspect and maintain the helicopter, including the engine in accordance with the applicable manufacturer's manuals, recommendations, bulletins, advisories, instructions for continuing airworthiness, the *Canadian Aviation Regulations* (the "*CARs*"), the *CARs* standards and the standards of good airmanship.

Airborne brought a motion to the Superior Court of British Columbia seeking particulars as to these allegations. In short, Airborne's position was that these allegations, as pled, were overly broad. Airborne maintained that it was not possible for it to understand the case against it unless it was provided with greater specificity by the plaintiff.

The Master deciding the motion heard arguments from Quantum to the effect that the action was still at the pleadings stage, and that documentary discovery was ongoing. As a result, argued Quantum, it was too soon for it to provide the requested level of specificity sought by Airborne.

I am satisfied that, to a large extent and with the exception noted, the request for particulars is premature. The exception is with respect to the applicable* CARs *sections and standards...

Quantum also argued that some of the information that it will need to make out its case (and provide greater particularization as to the negligent actions allegedly committed by the defendants) was still in the hands of other defendants, such as Honeywell which was expected to produce its applicable overhaul manuals, instructions, bulletins, recommended practices for the overhaul of the engine in question and instructions for continuing airworthiness. Only when those documents were produced, and the Honeywell representative had been questioned on discovery, would Quantum be in a position to set out informed particulars of negligence.

Master MacNaughton accepted Quantum's arguments with one exception, which is discussed further on in this article. She held that she was satisfied that Airborne had been provided with sufficient particulars to "take the matter through to examinations for discovery". She noted that there was no evidence from a representative of Airborne suggesting that it does not have sufficient particulars to respond to the action or to know the case it has to meet at this early stage of the proceedings.

On the issue of the *CARs*, however, Master MacNaughton considered the voluminous index to the *CARs*, which was attached to an affidavit filed by Airborne and noted that there are "many parts of the *CARs* which are irrelevant to this action and will not be in issue between the parties." She therefore ordered that Quantum provide particulars as to which sections it intended to rely upon.

It is likely that Master MacNaughton's rather bald order that Quantum provide particulars as to which sections of the *CARs* it is relying upon will be problematic for the parties — as there are thousands of sections and subsections in the *CARs* (organized under nine Parts, each with its own set of Subparts) — and Master MacNaughton did not specify the level of precision to which the sections had to be cited.

Because there was divided success on the motion, costs were ordered "in the cause" (i.e. the party that ultimately succeeds in the action will be entitled to costs of the motion).

Quantum Helicopters Ltd. v. Honeywell International Inc.
2011 BCSC 1352

Inside This Issue

Charges under the *Travel Industry Act, 2002*

In the Province of Ontario, persons holding themselves out as "travel agents" are required to register as such under the *Travel Industry Act, 2002*, or face fairly serious charges under that legislation. A recent decision from the Ontario Court of Justice provides some insight on how the Court will deal with the various excuses provided by persons who do not comply with the *Act*.

The facts of the case begin in September 2008 when Brian Gallop, the director and office administrator of the Cape Breton School of Arts (based in Nova Scotia) as well as Tracy Roper (the school's owner), contacted the accused, Kimberley Greco (the principal of the co-accused, Euro International Performance Tours Inc.) ("Euro") about the possibility of organizing a trip from Halifax to New York City for a number of Gallop's students and their friends and family members. Gallop and Roper had learned about Euro through its advertisement in a brochure distributed by Candance, a Canadian dance industry trade organization. After reviewing the advertisement, they viewed Euro's website and were impressed by the fact that Euro had organized dance-related trips to Italy, Spain, Greece and New York. They contacted Euro directly and dealt with Greco throughout.

After agreeing to the itinerary for the trip, Gallop paid a deposit in November 2008 and delivered a series of cheques to cover eight instalments, the last of which was due in June 2009. The total amount paid by Gallop on behalf of his students to Euro, via Greco, was $196,573.48. This covered airfare, hotel accommodation and some other activities that were to take place in New York.

All cheques were made payable to Euro and all receipts and invoices were issued on Euro's letterhead, but there were a few oblique references in some correspondence to "Marlin Travel" — but it is important to note that the first of these references did not occur until after the final installment was paid.

The trip proceeded successfully, for the most part, in early August 2009. However, after Euro's clients returned home, 17 of them noted that the hotel charged their stay to their credit cards, even though the hotel should been pre-paid as part of the Euro package. The total amount of the extra charges was $50,110.76. It appears that Euro had run into some cash flow problems and failed to pay the hotel in full for the rooms. Indeed, by the time the case was heard, Euro had been discharged as a bankrupt.

After having significant difficulty in reaching Greco, Gallop made a complaint to the Travel Industry Council of Ontario ("TICO"). TICO is responsible for administering the *Travel Industry Act* in Ontario, and this includes prosecuting persons who run afoul of it, as well as compensating persons who have lost their travel deposits paid to TICO registered travel agents.

Unfortunately for the travellers in this case, neither Greco, nor Euro were registered under the *Act*. Accordingly, the only action open to TICO in this case, was the prosecution of Greco and Euro. Both were charged with "… holding themselves out as being available to act as travel agents without first being registered …", contrary to s. 4(1)(a) of the *Act*.

The Court first had to determine whether there was a *prima facie* breach of the *Act*, before considering any applicable defences. In this respect, the Court noted that "travel agent" is defined in the legislation as "a person who sells, to consumers, travel services provided by another person". "Travel services" are defined as "… transportation or sleeping accommodation for the use of a traveller …". There was no doubt that Greco (and Euro) had been dealing with Gallop all along — and that airfare and hotel accommodations were part of the package, therefore, it appears that a *prima facie* violation of the *Act* did occur.

… statutory language used in public welfare legislation or consumer protection legislation should not be interpreted too narrowly so as not to achieve the legislation's intended purpose, and as such, a travel agent includes a person who contracts on his or her own behalf to sell travel services to consumers and one who sells services to consumers as agent for the provider of those services.

The Court then had to consider whether the accused held themselves out as travel agents. It was their evidence that, at no point did they use the term in connection to the services they provided. After considering jurisprudence on this point, the Court found that even though the term was never used, through their conduct (via their advertisement, website, correspondence and verbal discussions), a reasonable member of the public would have inferred that both Greco and Euro were acting as travel agents.

The accuseds then argued, because the airfare was booked by Euro through an Ontario travel agent (Marlin Travel) and the accommodations were booked through a US agent, Global Travel International, that Greco and Euro were acting not on their own behalf, but, rather, as agents of Marlin and Global — and therefore they were not required to register under the legislation.

The Court was not persuaded. First, with respect to Marlin Travel (which was a registered travel agent in Ontario), the Court held that, even though Greco had an agreement with Marlin to purchase airfare for the travellers, the travellers always dealt with Euro, made their cheques payable to Euro and all of their communication was with Euro. Apart from the few references to Marlin after the trip had been paid for, the travellers never had any information that Marlin was even involved in putting the package together. Accordingly, it could not be said that the dance troupe ever believed it was dealing with anyone other than Greco and Euro.

With regard to Global, the Court made the same finding but also noted that Global is not a registered travel agent in Ontario in any event, so the argument has even less force when it is applied to the accommodations reserved for the trip.

Greco and Euro made some other, rather feeble, arguments that did not find favour with the Court. For example, they argued that they were not aware that they had to register as agents under the *Act* (even though Greco's evidence was that she had been studying for, and later passed the TICO exam!).

Greco also argued that she had lacked business savvy and should therefore be acquitted of the charges, even though her own evidence was that she had run a dance school for many years in Sault Ste. Marie, Ontario and, following that, had been operating Euro for 10 years, having organized some 23-25 foreign dance trips for other dance troupes.

Greco and Euro were both convicted of the charges. Their sentencing was left to another day. Greco could receive a fine of up to $50,000 or imprisonment for a period of up to two years, less a day. Euro, as a corporate defendant, is liable for a fine of up to $250,000.

R. v. Euro International Performance Tours Inc. and Greco, 2011 ONCJ 504

Counsel Permitted to Act Against Former Railway Client

On December 17, 2008, the law firm of McKercher LLP ("McKercher") commenced a class action on behalf of Gordon Wallace against Canadian National Railway ("CN") seeking $1.75 billion, alleging that CN (and other railways) had overcharged western Canadian grain farmers for rail transportation over the previous 25 years.

The problem was that McKercher had acted for CN in the past, and, at the time the claim was being marshalled, it had four ongoing matters where it was representing CN.

CN was successful in disqualifying McKercher from acting on the Wallace matter after bringing a motion before the Saskatchewan Queen's Bench. McKercher appealed this decision to the Saskatchewan Court of Appeal. The decision was released at the end of September.

Before getting into the legal issues, it is important to understand the history of the relationship between CN and McKercher. CN operates close to 21,000 miles of track in North America and generated over $8 billion of revenue in 2008. It has thousands of employees world-wide, 75% of whom are in Canada. It employees 23 in-house counsel and consults with approximately 50 to 60 outside law firms in Canada. These firms bill CN for 600 individual files in any given year, roughly half of which involve non-regulatory litigation matters.

McKercher started acting for CN in arounbd 1999 — on a number of matters including corporate, commercial, tax, debt, collection, real estate and litigation files. In the 2004 to 2008 period, McKercher billed CN a total of $68,462. This amount was less that a third of all fees paid to Saskatchewan law firms in that period, and 0.1% of all fees paid to external counsel for the same time. Despite the fact that CN described McKercher as it's "go-to" law firm in Saskatchewan, a search of Court records for the period 1999 to 2009, revealed that 22 of the 32 matters in which counsel could be identified showed that McKercher was only representing CN on a single matter — and that a competitor of McKercher represented CN on 18 of the 22 matters.

Around the time McKercher commenced the Wallace claim, it represented CN in four matters. The first was a personal injury case that had occurred in 1997. Approximately two weeks before the issuance of the Wallace claim, McKercher had served a notice to CN of its intention to withdraw from that claim effective immediately. CN was required to retain new counsel to represent it in that action.

The second matter was a file in which McKercher was representing CN in the purchase of real estate. A lawyer from McKercher sought consent to continue with that matter, but such consent was refused by CN.

The third matter related to the fact that, at the time the Wallace claim was issued, two partners of McKercher in Regina were registered as holding power of attorney for CN. In a letter sent approximately one month after issuing the Wallace claim, the firm advised CN that, because of its role in the Wallace claim, it felt it was inappropriate for it to continue holding this power of attorney. The firm advised CN that it would cease to act in that capacity.

Finally, the fourth matter related to McKercher's representation of CN's interests in the receivership of the Meadow Lake Pulp Limited Partnership. Although the bulk of the work had been completed when the Wallace claim was issued, it was still active at that time. Less than a month after issuing the claim, a partner from McKercher wrote to the receiver indicating that he would no longer be representing CN. He did not advise CN of this decision. CN learned about it from the receiver's counsel two months later.

The appellate court had to consider two main issues. First, was McKercher disqualified from acting in the Wallace claim because it was in a conflict of interest? Second, had McKercher breached its duty of loyalty to CN?

On the issue of conflict of interest, the Court looked primarily to the two part test set out by the Supreme Court of Canada in *MacDonald Estate v. Martin* [1990] 3 S.C.R. 1235, where the Court held that:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

The Court emphasized with respect to the first point that the confidential information must be sufficiently related to the retainer from which the solicitor is to be removed.

The Court then turned to consider the duty of loyalty to existing clients and in this regard considered the Supreme Court's decision in *R. v. Neil* 2002 SCC 70, where the Court held that:

> The bright line is provided by the general rule that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client—*even if the two mandates are unrelated*, unless both clients consent …

The Court in *Neil* did, however, make an exclusion to the "bright line" test for professional litigants. With that class of litigant, the Court accepted that possibility that consent could be inferred in some circumstances where "the matters are sufficiently unrelated that there is no danger of confidential information being abused."

After a detailed analysis of the facts and law on this point, the Court concluded that there was no conflict because (1) CN was a "professional litigant", (2) the matters were not sufficiently related to require a disqualification, (3) there was insufficient evidence that confidential information could be abused, and (4) as a result of the above, the bright line test in *Neil* was subject to the aforementioned exclusion.

One of the deciding factors with regard to (3), above arose from the cross-examination of CN's affiant on the motion. When asked about the nature of the confidential information that could be abused, the affiant replied simply that, by acting for CN in the past, McKercher received "valuable specialized confidential information about CN's approach to litigation, its business practices and its perspective and tolerance." When asked to be more specific, he did not elaborate and declined to answer further.

The Court was unimpressed by this evidence, which it described as a "bald assertion". It noted that McKercher had only acted on one litigation file for CN in the past ten years — and that, in order to understand CN's true perspective on litigation, it would have had to act on a number of litigation files — not just a single matter. The Court specifically noted that, although CN suggested that McKercher was its primary litigation counsel in Saskatchewan, that "this was clearly not so". Accordingly, the Court did not accept that confidential information would be abused.

On the issue of whether McKercher had breached its duty of loyalty to CN, the Court noted that even if McKercher did so, this does not necessarily lead to its disqualification in the Wallace action. The Court described disqualification as a "blunt instrument" that is ultimately justified to protect the public's confidence in the legal profession and the administration of justice. The Court noted that. in this case, public confidence was not at issue — and that disqualification would be costly for Wallace because it would deprive him (and the estimated 100,000 class members) of the lawyer of his choice.

The Court found that CN has other remedies — including commencing an action for the cost of transferring the four files to new counsel and/or registering a complaint against McKercher with the Law Society of Saskatchewan.

McKercher's appeal was allowed —and, as a result, it was permitted to act as plaintiff's counsel in the Wallace class action.

Wallace v. Canadian Pacific Railway et al, 2011 SKCA 108

End of the Line: No Serial Access to Multiple Tribunals

We have had occasion to write about the Canadian rules that govern the services transportation companies are required to provide to persons with disabilities. One aspect of that question is the authority which will decide whether a particular individual was appropriately accommodated. There are two possibly competent authorities: the Canadian Human Rights Commission and the Canadian Transportation Agency.

Given two different legislative schemes and two possible avenues via which an accessibility claim may be brought, should an individual be allowed to advance a claim before one authority and, if dissatisfied with the result, try for a better outcome with the other? Whether such forum shopping is to be restrained, and if so how, is a question currently before the Federal Court of Appeal in a case which was argued in October.

Meanwhile, on October 27th the Supreme Court of Canada released reasons for decision in a case which impacts on the question of jurisdiction in accessibility matters although the case arose out of a work related accident to which a workers compensation scheme applies. The recent Supreme Court decision, which we will refer to as *Figliola* actually involved a number of accidents and compensation claims arising out of those accidents. All took place in British Columbia and all the injured parties advanced claims for statutory compensation. The procedural history is quite complicated, but for our purposes can be shortened significantly.

In essence, in each case a claim was made to the provincial Workers' Compensation Board. The result was not to the liking of the injured parties. These parties could have challenged the unfavourable decisions both internally and by way of judicial review. However, they elected not to do so. Instead they filed a complaint with the British Columbia Human Rights Tribunal.

The Workers' Compensation Board brought a motion before the Tribunal, asking it to dismiss the complaint on the ground that the substance of the matter had been appropriately dealt with by the Board. The Tribunal denied the relief sought. That decision of the Tribunal was set aside on judicial review, but restored by the Court of Appeal. The Supreme Court of Canada then reversed the Court of Appeal, finding that the Tribunal's decision was patently unreasonable. It ought to have dismissed the complaint.

The majority of the Supreme Court focused on three factors which, it found, should have led the Tribunal to refuse to hear the complaint. First, based on recent jurisprudence, the Workers' Compensation Board, at the time it dealt with the complaints, clearly had concurrent jurisdiction to deal with human rights issues. Secondly, the issue which the complainants sought to raise before the Human Rights Tribunal was essentially the issue which had already been determined by the Board. Lastly, the complainants had been advised of the case to be met and had been given an opportunity to meet it. That, in the view of the majority, was enough to settle the matter. The decision contains some fine ringing phrases. After a review of principles favouring finality in decision making the majority sums up by asserting that these principles "are a rebuke to the theory that access to justice means serial access to multiple forums, or that more adjudication necessarily means more justice."

Four of the nine justices who participated in the decision came to the same conclusion—the Tribunal was wrong to hear the case—but they supported that conclusion with somewhat different reasons.

In essence, the position of this concurring minority is that the majority would confine the discretion of the Tribunal too narrowly. The reasons of the majority give more importance to the value of finality that the minority is prepared to accept. While agreeing that finality is an important consideration, the minority does not accept that it is the only, or even most important, consideration. Rather they would allow the Tribunal to consider numerous factors when deciding whether to hear a particular matter, even if it was heard previously by another decision maker. These would include the mandate of the previous decision maker, the purposes of the competing legislative schemes, the existence of review mechanisms, the safeguards built in to the process and, most importantly, whether refusal to hear the matter might work substantial injustice.

The reasons of the majority will certainly be easier to apply in any particular case.

British Columbia (Workers' Compensation Board) v. Figliola, 2011 SCC 52

Gerard Chouest
(416) 982-3804
chouest@lexcanada.com

Tae Mee Park
(416) 982-3813
tpark@lexcanada.com

James P. Thomson
(416) 982-3805
jthomson@lexcanada.com

Ioana Bala
(416) 982-3810
ibala@lexcanada.com

Carlos Martins
(416) 982-3808
cmartins@lexcanada.com

Chris Dearden
(416) 982-3812
cdearden@lexcanada.com

IATA | Strategic Partner

BERSENAS JACOBSEN CHOUEST THOMSON BLACKBURN LLP
BARRISTERS, SOLICITORS

33 Yonge Street Suite 201,
Toronto, Ontario, CANADA
Phone: 416 982-3800
Fax: 416 982-3801

Our transportation law group represents the interests of carriers in litigation of personal injury, property loss and commercial disputes. We also advise on insurance and regulatory issues and represent clients before the courts, agencies, tribunals and authorities with important jurisdiction over transportation undertakings.

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